

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JANE DOE on behalf of herself and her minor child; JANE BOE, Sr. on behalf of herself and her minor child; JOHN COE, Sr. and JANE COE, Sr. on behalf of themselves and their minor children; JOHN FOE, Sr. on behalf of himself and his minor child; JANE GOE, Sr. on behalf of herself and her minor child; JANE LOE on behalf of herself and her medically fragile child; JANE JOE on behalf of herself and her medically fragile child; CHILDRENS HEALTH DEFENSE, and all others similarly situated,

Plaintiffs,

-against-

Civil Case No.: 1:20-cv-840
(BKS-CFH)

HOWARD ZUCKER, in his official capacity as Commissioner of Health for the State of New York; ELIZABETH RAUSCH-PHUNG, M.D., in her official capacity as Director of the Bureau of Immunizations at the New York State Department of Health; the NEW YORK STATE DEPARTMENT OF HEALTH; THREE VILLAGE CENTRAL SCHOOL DISTRICT; CHERYL PEDISICH, acting in her official capacity as Superintendent, Three Village Central School District; CORRINE KEANE, acting in her official capacity as Principal, Paul J. Gelinas Jr. High School, Three Village Central School District; LANSING CENTRAL SCHOOL DISTRICT; CHRIS PETTOGRASSO, acting in her official capacity as Superintendent, Lansing Central School District; CHRISTINE REBER, acting in her official capacity as Principal, Lansing Middle School, Lansing Central School District; LORI WHITEMAN, acting in her official capacity as Principal, Lansing Elementary School, Lansing Central School District; PENFIELD CENTRAL SCHOOL DISTRICT; DR. THOMAS PUTNAM, acting in his official capacity as Superintendent, Penfield Central School District; SOUTH HUNTINGTON SCHOOL DISTRICT; DR. DAVID P. BENNARDO, acting in his official capacity as Superintendent, South Huntington School District; DR. DAVID MIGLIORINO, acting in his official capacity as Principal, St. Anthony's High School, South Huntington School District; ITHACA CITY SCHOOL DISTRICT; DR. LUELLE BROWN, acting in his official capacity as Superintendent, Ithaca City School District; SUSAN ESCHBACH, acting in her official capacity as Principal, Beverly J. Martin Elementary School, Ithaca City School District; SHENENDEHOWA CENTRAL SCHOOL DISTRICT; DR. L. OLIVER ROBINSON, acting in his official capacity as Superintendent, Shenendehowa Central School District; SEAN GNAT, acting in his official capacity as Principal, Koda Middle School, Shenendehowa Central School District; ANDREW HILLS, acting in his official capacity as Principal, Arongen Elementary School, Shenendehowa Central School District; COXSACKIE-ATHENS SCHOOL DISTRICT; RANDALL SQUIER, Superintendent, acting in his official capacity as Superintendent, Coxsackie-Athens School District; FREYA MERCER, acting in

her official capacity as Principal, Coxsackie-Athens High School, Coxsackie-Athens School District; ALBANY CITY SCHOOL DISTRICT; KAWEEEDA G. ADAMS, acting in her official capacity as Superintendent, Albany City School District; MICHAEL PAOLINO, acting in his official capacity as Principal, William S. Hackett Middle School, Albany City School District; and all others similarly situated

Defendants.

DECLARATION

LORI MCKENNA, declares under the penalty of perjury, upon information and belief:

1. I am currently employed by the Albany City School District (hereinafter “Albany CSD” or “District”) as the *Assistant Superintendent for Secondary Education*.
2. I respectfully submit this Declaration in opposition to that portion of the August 25, 2020 motion by Plaintiffs which seeks a preliminary injunction against, among other parties, the Albany CSD, which motion seeks to: (a) compel the Albany CSD to accept and approve any medical exemption application submitted on behalf of any school-aged child which is accompanied by a physician’s letter and thus enrolling such students in the Albany CSD; and (b) prevent the Albany CSD from complying with and applying the state law governing medical exemptions from student immunization requirements, including specifically Regulation 10 N.Y.C.R.R. § 66-1 (hereinafter “PI motion”).
3. Prior to preparing and executing this Declaration, I reviewed the following documents: (a) portions of the Complaint in this action, including specifically paragraphs ¶¶ 161-180; (b) portions of the PI motion directed at the Albany CSD; and (c) records maintained by the Albany CSD which pertain to the child which Plaintiffs refer to as “JOHN FOE” in their Complaint (hereinafter “J. Foe”). By the Declaration I do not intend to waive any attorney-client privilege

which the Albany CSD or I enjoy or disclose any confidential information regarding any student other than “J. Foe,” whom Plaintiffs have made allegations and arguments about in the action.

4. According to the Albany CSD records, J. Foe last attended the Albany CSD’s Hackett Middle School as a Sixth grade student on September 23, 2019. According to the records of the Albany CSD, and as confirmed by J. Foe’s attorney (Jessica Wallace, Esq.) by letter dated October 1, 2019 addressed to me (Exhibit “A”), J. Foe and his two siblings’ prior attendance as Albany CSD students was “*with a religious exemption*” (Ex. A p. 1). Thus, with respect to J. Foe, the Albany CSD did not change the manner in which it reviewed medical exemptions as a result of the 2019 state amendments, rather J. Foe’s first medical exemption request was not submitted until the Fall of 2019.

5. As reflected by his Attorney’s letter, J. Foe’s parents first submitted a medical exemption application on or about September 9, 2019 (not August 23, 2019 as alleged in ¶ 167 of their Complaint). As further reflected by J. Foe’s Attorney’s letter, as of October 1, 2019 J. Foe’s parents represented that they had “*reached out to [J. Foe’s] local gastroenterology specialist and his pediatrician to discuss a more detailed medical exemption...*” (Ex. A p. 2).

6. Contrary to the allegations in the Complaint, J. Foe’s medical exemption application was not merely reviewed by school administrators. Rather, from the very outset of the process, the Albany CSD consulted with licensed medical professionals, including Doctor Laura Staff, who serves as the District’s Medical Director. Upon information and belief, Dr. Staff reviewed J. Foe’s initial medical exemption application on or before September 23, 2019, conferred with the NYS Department of Health, Bureau of Immunizations (“NYS DOH”) regarding J. Foe’s medical exemption application, and consulted the NYS DOH’s official guidelines for determining medical exemptions (*see* Ex. B p. 1). Based upon Dr. Staff’s review of J. Foe’s

application and Dr. Staff's medical opinion that the conditions described in such application did not constitute a valid reason for not immunizing J. Foe, the attached September 24, 2019 letter (Ex. B) was prepared and forwarded to J. Foe's parents along with information they could utilize in the event that they chose to appeal that initial determination.

7. Attorney Wallace's October 1, 2019 letter, taking exception to the District's September 24, 2019 determination, was forwarded to the Albany CSD's Board Attorneys, Jeffrey Honeywell, Esq. and Michael Gadomski, Esq., of the Honeywell Law Firm.

8. By letter dated October 2, 2019, Attorney Gadomski responded to J. Foe's Attorney. A copy of that letter response is attached hereto as Exhibit "C."

9. Shortly after October 7, 2019, Attorney Gadomski shared with me a copy of Attorney Wallace's October 7, 2019 reply letter, wherein J. Foe's attorneys stated "*we understand that the district is acting within their rights in refusing to admit [J. Foe] back into school while he is awaiting consults with his gastroenterology specialist and pediatrician in order to obtain a more detailed medical exemption.*" (see Ex. C p. 3).

10. On or about October 7, 2019, the Superintendent of Schools (Kaweeda Adams) forwarded to my attention a letter from J. Foe's father requesting to homeschool J. Foe (and his siblings). Upon information and belief, J. Foe's father's homeschooling request was promptly processed by the District's Assistant Director of Pupil Personnel Services, Ms. Karla McDowell. Upon information and belief, the District's Office of Pupil Personnel Services developed an Individualized Home Instruction Plan (or "IHIP") for J. Foe and his siblings on November 14, 2019.

11. On December 5, 2019, three (3) months after J. Foe's initial exemption application, the District received a second medical exemption application which included approximately 48

pages of attachments. That second exemption application and the attachments were immediately sent to Dr. Staff for her review. Based upon my communications with Dr. Staff, between December 5, 2019 and December 18, 2019, Dr. Staff again reviewed J. Foe's revised exemption application and attachments and consulted with a variety of medical resources including, but not limited to: 1) reviewing medical literature regarding SNP polymorphisms as contraindication to vaccination in general and specific populations; 2) review of medical databases including those maintained by the Center for Disease Control, UpToDate, and ACIP; 3) direct consultations with J. Foe's Pediatrician (Dr. Bovenzi); and 4) further consultations with the New York State Department of Health. Notably, during this review process, J. Foe's Pediatrician initially declined to provide Dr. Staff with the actual lab report on which J. Foe's medical exemption was based. On December 18, 2019, Dr. Staff reported that she received a print-out regarding the lab information she had requested from Dr. Bovenzi, but the document listed a "Cynthia L. Smith" as the source and reference. Upon information and belief, Cynthia Smith is not a physician and, on her website, Cynthia Smith describes herself as an anti-vaccination advocate and a former attorney who now studies "Chinese medicine." Finally, on December 19, 2019, Dr. Staff spoke directly to a CDC Vaccine Expert regarding the alleged bases for J. Foe's exemption application, including the "lab information" provided on December 18, 2019. Dr. Staff confirmed her research with the CDC that there existed no medical data or peer-reviewed studies which indicated that the condition relied upon by J. Foe was contraindicated for vaccines.

12. After further consultation with Dr. Staff and Attorney Gadowski, I signed and sent the attached January 3, 2020 letter (Ex. D), advising J. Foe's parents that their revised exemption application had been denied. Specifically, I informed J. Foe's parents in my January 3, 2020 letter that *"the District's medical director in consultation with CDCP concluded that [J. Foe's] genetic*

makeup does not constitute a medical contraindication or precaution to a specific immunization consistent with any nationally recognized evidence-based standard of care.” (Ex. D). As also reflected in my January 3, 2020 letter, I specifically advised J. Foe’s parents, again, of their right to “*appeal this decision to the Commissioner of Education pursuant to N.Y. Education Law § 310 and N.Y. Public Health Law § 2164(7)(b).*” To my knowledge, J. Foe’s parents never filed any such appeal.

13. I did not hear anything further from J. Foe’s parents from December 2019 until August 2020, when I learned about the above-captioned lawsuit.

WHEREFORE, I respectfully request that the Court: (a) deny Plaintiffs’ motion for a preliminary injunction; and (b) grant such other and further relief in favor of the Albany CSD as this Court deems just and proper.

Dated: September 3, 2020

Lori A. McKenna